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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion. Its findings of fact (A. 69–100), conclusions of law (A. 100–101) and judgment and decree (A. 102–103) are reported at 280 F. Supp. 978.[1]

JURISDICTION

The judgment of the district court was entered on January 31, 1968 (A. 102–103), and a notice of appeal was filed on February 23, 1968. This Court noted probable jurisdiction on October 21, 1968.

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[1] "A." refers to the printed appendix before this Court; "F." to the district court's findings of fact; "C.L." to the court's conclusions of law; "Tr." to the trial transcript; "G.X." to government exhibits; and "D.X." to appellants' exhibits.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

QUESTIONS PRESENTED

In 1940, Tucson's two daily newspapers, the Star and the Citizen, concluded an operating agreement which provided both for the joint production and distribution of the papers and for the elimination of all commercial competition between them. In 1965, the Citizen acquired the Star. The following questions are presented:

1. Whether the price-fixing, profit-pooling and market-allocation aspects of the 1940 agreement are unlawful *per se* under Section 1 of the Sherman Act.

2. Whether upon holding that the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act, the district court properly ordered divestiture of the acquired paper.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, provide:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or com-

> merce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides:

> * * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from the final judgment of the district court in a civil antitrust action holding (1) that portions of a 1940 joint operating agreement between appellants Citizen Publishing Company and Star Publishing Company, the publishers of Tucson's only two daily newspapers of general circulation, provided for price fixing, profit pooling and market allocation in violation of Section 1 of the Sherman Act (15 U.S.C. 1), and (2) that the acquisition of the Star by the Citizen in 1965 violated Section 7 of the Clayton Act (15 U.S.C. 18) (A. 100–101). The district court further held that appellants, by means of the 1940 joint operating agreement and the 1965 acquisition, had combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (15 U.S.C. 2) (A. 100). The judgment requires divestiture of the Star and its reconstitution

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as an independent newspaper competitor in Tucson, calls for modification of the joint operating agreement so as to eliminate the price-fixing, profit-pooling and market-allocation provisions, and enjoins appellants from resuming such conduct after divestiture (A. 102–103).[2]

1. THE FACTS

The Arizona Daily Star ("Star") and the Tucson Daily Citizen ("Citizen") are the only daily newspapers of general circulation published in Tucson (F. 10, 11, A. 71). The Star is a morning paper published seven days a week; the Citizen is an evening paper published Monday through Saturday. Each is a high-quality metropolitan newspaper with an average daily circulation of more than 42,000 copies (F. 64, 116, A. 81–82, 88). More than 80 percent of their combined daily circulation is in Pima County, Arizona, which comprises the Tucson standard metropolitan area (F. 182, 183, A. 98). In 1964, the combined daily circulation of the Star and the Citizen in that county was about 74,000 (F. 116, A. 88); out-of-town daily newspaper circulation there was about 3,400 (F. 112, A. 87). Both the Star and the Citizen are presently highly profitable business enterprises. Their combined profits in 1964, before taxes, were about $1.7 million, on revenues of about $8.7 million (F. 37, A. 76).

A. THE 1940 JOINT OPERATING AGREEMENT

(i) *Background.* The Citizen, founded before 1900, is the oldest newspaper in Arizona; the Star began

[2] The judgment has been stayed by the district court pending this appeal.

operations shortly after the Citizen (G.X. 15, pp. 9–10; G.X. 26, A. 416). Prior to 1940, the Star and the Citizen had vigorously competed with each other in all phases of the newspaper business (F. 176, 178, A. 97; A. 570, 149, 162; Tr. 1429, 1536). Their circulation figures were about equal, but the Star, which has a Sunday edition, sold 50 percent more advertising space than the Citizen (which terminated its Sunday paper in 1933) and operated at a profit, while the Citizen sustained losses (F. 12, 13, A. 71). In the years 1935 through 1939, the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged approximately $23,550 (G.X. 47, A. 434–435).

In 1936, the stock of Citizen Publishing was purchased by William A. Small, Sr., and William H. Johnson for $100,000, and the purchasers invested $25,000 of working capital in the paper (F. 14, A. 71–72). Small was an experienced newspaper man, and had been a partner in a newspaper representative firm which had served the Citizen for many years (A. 195–197). At the time he acquired a stock interest in the Citizen, Small was aware that the newspaper had been unprofitable since 1932, and that its losses had been defrayed by contributions from its stockholders (F. 12, 14, A. 71–72).

Between 1936 and 1939, Small sought to interest three of his personal acquaintances in investing some money in the Citizen, but they were not prepared to do so at that time (A. 204–206). During this period Small increased his own interest in the Citizen from 25 to 75 percent (A. 197–198, 200; F. 14, A. 71–72).

The record does not show that Small made any efforts to sell the Citizen prior to 1940 nor does it indicate whether he took active measures to improve its competitive position. From 1936 to 1939 Small resided in Chicago and made about 19 trips to Tucson; he moved to Tucson in 1939 (A. 199), prepared to finance the Citizen's losses for some little time thereafter from his own resources (F. 14, A. 71–72; A. 206).

Sometime during 1936, the Star initiated discussions with the Citizen concerning the possibility of operating the two newspapers jointly (F. 16, A. 72; A. 147–149, 184–185). The negotiations initially were unsuccessful, but were resumed in 1939 (A. 201–202, 199), and in March 1940 the Star and the Citizen entered into a 25-year joint operating agreement (F. 17, A. 72). At the time the agreement was made, the Citizen, despite its losses, was not on the verge of going out of business, nor was it probable that the Citizen would have done so had the agreement not been consummated (F. 14, 17, A. 71–72).

(ii) *The 1940 agreement.* The joint operating agreement provided that each newspaper would retain its own news and editorial department as well as its corporate identity (F. 18, 26, A. 72–74). The agreement was intended, however, to end all commercial competition between the two newspapers (F. 23, 24, A. 74). It called for the formation of appellant Tucson Newspapers, Inc. ("TNI"), owned in equal shares by the Star and the Citizen, whose function would be "to manage and operate all of the departments of the publishing business of Star and Citizen (excluding the news and editorial departments * * *), and to inte-

grate the operation of said business as much as possible" (F. 5, 18, A. 70, 72–73). The production and distribution equipment of each newspaper was placed in joint ownership, and possession of these assets was transferred to TNI (F. 27, 28, A. 74–75). Star Publishing and Citizen Publishing were each to appoint two directors for TNI; a fifth director would be selected by Citizen Publishing from three persons to be nominated by Star Publishing (F. 29, A. 75).

The operating agreement contemplated the continuation of the Star and the Citizen as separate and active entities. The parties agreed, "as far as practicable, to maintain the present make-up and format of their respective newspapers in order to preserve their respective identities and characteristics" (A. 43). Each paper separately paid the costs of its own news and editorial departments (A. 43) and exercised "exclusive direction and control" of all its employees in those departments (A. 44). Each party remained "separately responsible" for liabilities incurred "through the publication of any libelous matter in their respective newspapers" (A. 41), and for its own contractual obligations "unless such contracts are expressly assumed" by TNI (A. 45). Thus, as the court found, at all times since 1940 "Star Publishing and Citizen Publishing remained independently owned corporations and retained the sole ownership of their respective newspapers" (F. 26, A. 74).[3]

[3] In June 1953, when the parties extended the term of the operating agreement to 1990, they provided for final, binding arbitration of disputes between them concerning the agreement (A. 48–49).

Prior to 1940, the Star and the Citizen had been engaged in direct commercial competition for advertising and circulation revenues. Mr. Small, the owner of the Citizen, conceded at the trial that it was the purpose of the operating agreement to end that pre-existing competitive situation (A. 212). Similarly, the Star's owner, Mr. Mathews, acknowledged that the agreement was designed "to end commercial competition between the Star and Citizen" (A. 194). This result was to be achieved by the three aspects of the joint operating agreement which the district court held illegal:

1) *Price fixing.* Pursuant to the agreement, the Star and the Citizen were sold and distributed to the public by the circulation department of TNI; commercial advertising placed in the papers was sold by the advertising department of TNI; and the subscription and advertising rates of the Star and the Citizen were set by them jointly, acting through TNI. Neither newspaper retained the power to set its own subscription or advertising rates individually (F. 19, A. 73).

2) *Profit pooling.* The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio that favored the Star (F. 19, A. 73).[4]

[4] It provided that for the first ten years of operation under the agreement the Star would receive 70 percent and the Citizen 30 percent of the first $100,000 of TNI's profits, with additional profits to be evenly divided. After ten years, the Star would receive 55 percent and the Citizen 45 percent of the first $200,000, and profits over that amount would be divided equally (G.X. 2, A. 39–40).

The profit-pooling provision was deemed essential to prevent a recurrence of commercial competition between the two newspapers (F. 24, A. 74; A. 192–193, 206–207, 381).

3) *Market allocation.* The agreement provided that Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other business in Pima County in conflict with the agreement (F. 19, A. 73). This provision effectively prevented the Star and the Citizen from conducting any publishing operation individually which invaded each other's morning or afternoon field (A. 384–385; see G.X. 26, A. 420).

Thus, the 1940 agreement not only enabled the Star and the Citizen to engage in joint production while remaining independent businesses, but it also ended their commercial rivalry. The district court found that the papers can have the benefits of joint production and distribution without continuing the price-fixing, profit-pooling and market-allocation agreements (F. 190, A. 98–99), and concluded that the agreement was not designed solely to reduce the parties' costs (F. 23, A. 74) but also to give them a commercial monopoly in Tucson (F. 40, A. 77).

Since 1940, the Star and the Citizen have been operated pursuant to the agreement (F. 25, A. 74). The original term of the agreement was 25 years; in 1953 it was extended until 1990. The agreement may be canceled only by mutual consent of the parties (F. 20, A. 73, A. 45).

Before the agreement was executed, the parties had planned to increase their advertising rates after the first year of joint operation, and in fact did so (F. 38, A. 77). In the first full year of joint operation, the combined profits were 10.4 percent of revenues and thereafter have never been less than 10.2 percent of revenues; since 1959, profits have been constant at about 20 percent of revenues (F. 35, 36, A. 76). Combined revenues increased from $519,168 in 1940 to $8,654,127 in 1964; combined profits, before taxes, rose from $27,531 in 1940 to $1,727,217 in 1964 (F. 37, A. 76).

B. THE 1965 STOCK ACQUISITION

At the same time that Star Publishing and Citizen Publishing concluded the joint operating agreement, their shareholders entered into a related stock option agreement which provided that if the shareholders of either corporation wished to sell their stock, the shareholders of the other corporation would have an option to purchase it (F. 47, 48, A. 78). One of the purposes of this stock option agreement was to ensure appellant's control of entry into the daily newspaper business in Tucson (F. 49, A. 78).[5]

[5] Appellants stated in their answer to the complaint (A. 63–64):

> [T]he execution of said Stock Agreement was for the following purposes:
>
> (a) To assure that in the event the owners of one newspaper were to sell their stock, the owners of the remaining newspaper would be in a position to prevent such sale if they felt that the prospective new owner would not be compatible in the use of the joint operating equipment

From time to time before 1964, the owners of the Star had considered a sale of the paper (A. 357). In 1964, they negotiated with Robert M. White, a newspaper man from Missouri (A. 357–358). The Smalls, who controlled the Citizen, met with White, who indicated he was willing to amend the joint operating agreement to give the Citizen an equal voice in the selection of TNI's directors and an equal share of the pooled profits (A. 358–359). The Smalls thereupon agreed to waive their option and permit White to acquire the Star (D.X. 38, A. 472).[6]

While the Star's negotiations with White were in progress, Brush-Moore Newspapers, Inc., publishers of a chain of papers (A. 207), offered $10 million for the Star (F. 50, A. 79; A. 364). Brush-Moore told the Smalls that "the only reason they were willing to pay ten million dollars for the Star [was] because they very well recognized the competitive advantage

and facilities established pursuant to the Operating Agreement.

(b) To protect the community in and about Tucson, Arizona, from any new newspaper ownership which would not maintain the high standards of journalism required in a cultural and University center.

(c) To preserve both newspapers as independent editorial voices, responsible in all phases of local affairs by preventing either newspaper from being owned by a chain newspaper with a stereotyped and mechanical editorial policy unconcerned with responsible leadership in local affairs.

[6] It is not altogether clear how far the Star's negotiations with White progressed. Defense counsel indicated at trial that White offered $8 million for the Star (Tr. 21), but there is some suggestion in the record that the offer was not a firm one (A. 210).

the TNI operating agreement gave them [in the choice of directors and the division of pooled profits] and they weren't about to change" the terms of the agreement to give the Citizen parity (A. 363–364).

In order to prevent Brush-Moore from acquiring the Star, the shareholders of Citizen Publishing exercised their option and purchased the paper themselves upon the same terms as the Brush-Moore offer (F. 51, A. 79; A. 208, 212, 385, 567). They did so by forming appellant Arden Publishing Co. ("Arden"), which acquired the stock of Star Publishing in January 1965 (F. 52, A. 79) and its assets in March 1966, when Star Publishing was liquidated (F. 7, A. 70–71). Arden now publishes the Star (*ibid.*).

2. THE PROCEEDINGS BELOW

The government's complaint, filed on January 4, 1965, charged that appellants had combined and conspired to restrain and to monopolize the daily newspaper business in Tucson by means of the 1940 joint operating agreement, in violation of Sections 1 and 2 of the Sherman Act; and that the proposed acquisition of the Star by the shareholders of Citizen Publishing would violate Section 7 of the Clayton Act and was also in furtherance of the unlawful combination and conspiracy. On January 5, 1965, following the district court's denial of the government's motion for a temporary restraining order, appellant Arden acquired the stock of Star Publishing. On February 2, 1965, the court, on consent of the parties, issued a preliminary injunction designed to prevent an actual

consolidation of the Star and the Citizen pending a final judgment on the merits.[7]

A. THE SECTION 1 VIOLATION

Prior to trial, the government moved for summary judgment with respect to the Section 1 offense, asserting that the operating agreement in terms provided for price fixing, profit pooling and market allocation, and that these provisions were unlawful *per se*. Agreeing with the government (see A. 102), the court found that the terms of the joint operating agreement were not in dispute, and, acting pursuant to F.R. Civ. P. 56(d) (A. 138), determined that only the question of relief remained to be decided as far as the challenged provisions of the agreement were concerned.[8] The court regarded its ruling as tantamount to granting summary judgment on the issue of Section 1 liability (A. 140–141).

Thus, the principal issues for trial, held in April 1966, were whether appellants had conspired to monopolize the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act, and whether the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act. With respect to

[7] On March 31, 1966, the court issued an order permitting the liquidation of Star Publishing and the acquisition of its assets by Arden (F. 7, A. 70). The preliminary injunction otherwise continues in effect.

[8] As formulated by the court, the only question for trial relating to this issue was: "How can modification of the 'operating agreement' be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citizen, to the fullest extent possible, the benefits of joint use of staff and facilities?" (A. 139).

their intent, appellants were permitted to introduce evidence as to the alleged failing condition of the Citizen in 1940 and its alleged inability to survive in the future without the existing arrangement (see, *e.g.*, A. 145). At the close of the trial, appellants unsuccessfully moved to set aside the court's summary judgment and for reconsideration of the entire arrangement under the rule of reason (docket entry 155, A. 17; docket entry following 170, A. 18).

B. THE SECTION 7 VIOLATION

The district court found that Pima County, in which more than 80 percent of appellants' circulation was distributed (F. 183, A. 98), was the appropriate geographic market in which to appraise the competitive effects of the merger (F. 189, A. 98). The court further determined that the daily newspaper business was the relevant product market (F. 60–181, A. 80–98).

The court held that the Citizen's acquisition of the Star had the effect of continuing, in a more permanent form, the elimination of commercial competition between them which had resulted from the 1940 joint operating agreement (F. 58, A. 80), and virtually foreclosed the possibility of a resumption of competition upon the expiration or cancellation of that agreement (F. 57, A. 80). The court concluded that "[t]he acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson" (F. 59, A. 80), and therefore violated Section 7 of the Clayton Act (C.L. 7, A. 100–101).

C. THE SECTION 2 VIOLATION

The court also concluded that, pursuant to the 1940 agreement, appellants had "acquired monopoly power over the daily newspaper business in Tucson" (C.L. 3, 4, A. 100). It determined that newspapers are, in important respects, a unique news and advertising medium for which the broadcasting media are not an effective substitute (F. 111, 164, A. 87, 95). Circulation figures and advertising volume of the Star and the Citizen have consistently increased, the court found, despite the growth of radio and television stations in Tucson, and despite periodic increases in subscription and advertising rates (F. 115, 120, 169, 172, 177, A. 88, 89, 96, 97). Finding that appellants' monopoly power, far from being thrust upon them or inevitable, was the direct result of the 1940 joint operating agreement (C.L. 3, A. 100), the court concluded that appellants, "in entering into * * * [that agreement], did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson" (C.L. 4, A. 100); and that they had thus combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (C.L. 3, 6, A. 100).

D. THE JUDGMENT

The decree of the district court requires appellants to submit a plan for divestiture and reestablishment of the Star as an independent competitor, and for modification of the joint operating agreement to

eliminate the unlawful price-fixing, market-allocation, and profit-pooling provisions. The decree does not, however, prohibit other forms of joint operation (see A. 103).[9]

3. APPELLANTS' FUTURE PROSPECTS

As noted above (pp. 4, 10), the Star and the Citizen are today profitable businesses, with combined pretax profits in 1964 of about $1.7 million on revenues of about $8.7 million (F. 37, A. 76). Moreover, in terms of advertising and circulation, the Citizen, the evening paper, compares quite favorably with the Star. In 1964, the Citizen accounted for about 48 percent of the combined advertising lineage (including the Star's Sunday edition); the Citizen's national advertising lineage slightly exceeded the Star's, and its local advertising lineage was more than 49 percent of the combined total of both newspapers (G.X. 50, A. 451). The daily circulations of the Star and the Citizen are about equal; in the third quarter of 1965, the Citizen averaged 40,978 copies and the Star averaged 40,908 (G.X. 49, A. 450).

A defense exhibit (D.X. 163, A. 501), a pro forma restatement of past operating results, purported to show that Citizen would have experienced losses in 1962–1964 had the two papers been limited to joint production and distribution. The accountant who pre-

[9] The court found that "[t]he printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price fixing, profit pooling, and market allocation agreements" (F. 190, A. 98–99), and ruled only that "[p]laintiff is entitled to a decree directing * * * modification of the operating agreement" (C.L. 8, A. 101), not its complete abrogation.

pared the exhibit conceded that it was based, *inter alia*, on the assumption that advertising and circulation revenues would have been the same under that arrangement as they were under the operating agreement (A. 316). The court found that "because of the lack of competition" the Star and the Citizen have not engaged in significant promotion to increase circulation (F. 122, 123, A. 89). Appellant's witness testified that a two percent increase in Citizen's revenues would wipe out his projected loss (A. 348); that he had no way of knowing what each paper's revenues actually would have been under joint production and distribution (A. 315–318, 322); and that on a cash flow basis the exhibit would have disclosed a profit for Citizen in 1964 of about $52,000 (A. 339–344). The district court concluded that "it is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation" (F. 192, A. 99).[10]

ARGUMENT

INTRODUCTION AND SUMMARY

In 1940 the only two daily newspapers published in Tucson, Arizona—a morning and an afternoon newspaper (the Star and the Citizen, respectively)—entered into an operating agreement which was intended to, and did, eliminate all commercial competition between them. Under the agreement, the two

[10] In 1965, 23 cities smaller than Tucson and 19 cities larger than Tucson had two or more competing daily newspapers not operated under a joint operating plan (D.X. 63a, A. 478). Tucson's present population range is 200,000–300,000 (App. Br. p. 6); some nine cities in the 100,000–400,000 population range have newspapers which compete commercially.

papers set advertising and subscription rates jointly; pooled their profits and distributed them according to a fixed formula rather than on the basis of the amount of revenue that each contributed; and agreed not to engage in any other business that conflicted with the agreement. In 1965 the Citizen acquired the Star.

The government filed a civil antitrust suit contending (1) that the 1965 merger violated Section 7 of the Clayton Act, (2) that the price-fixing, profit-pooling and market-allocation provisions of the operating agreement violated Section 1 of the Sherman Act and (3) that the newspapers had conspired and combined to monopolize, and had monopolized, the daily newspaper business in Tucson by means of the agreement and the merger. The government moved for summary judgment on the Section 1 charge. The district court granted the motion, ruling that the price-fixing, profit-pooling and market-allocation provisions were illegal *per se*.

Appellants contended that these provisions were not *per se* illegal, but were to be tested under the rule of reason because the operating agreement in effect constituted a partial merger of the two newspapers; and that under the rule of reason the agreement was lawful because in 1940 the Citizen was a "failing company" as that concept had been developed as a justification for mergers challenged under Section 7 of the Clayton Act. Although summary judgment was entered as to the Section 1 violations, the district court subsequently permitted appellants to introduce extensive evidence on the failing company issue during the trial of the Section 2 and Sec-

tion 7 issues. After the record was closed, the defendants moved the district court to reconsider its Section 1 ruling on the basis of the evidence they had introduced relating to the Citizen's financial condition at the time the operating agreement was adopted. The district court declined to do so. It found that the defendants had not established on the record that the Citizen in fact was failing in 1940. It also ruled that the defendants had not established that the Citizen could not operate successfully in the future without the three restrictive provisions of the 1940 agreement which the court held violated Section 1. The court directed divestiture of the Star and termination of those restrictive provisions. Its injunction, however, is limited to those provisions and permits the two newspapers to continue any joint production and distribution arrangements that do not unreasonably restrain trade.

The district court further held that appellants had conspired and combined to monopolize, and had monopolized, the newspaper business in Tucson by means of the operating agreement and the merger, in violation of Section 2 of the Sherman Act. As we read the district court's decision, however, the basis of that ruling was that the appellants had acquired and maintained their monopoly power as a result of the illegal provisions of the operating agreement (C.L. 2–4, A. 100). If this Court upholds the district court's decision that the restrictive provisions of the agreement were *per se* illegal, that ruling fully supports the district court's judgment cancelling those provisions. If, on

the other hand, this Court were to reverse on the Section 1 issue, such reversal also would undermine the district court's holding of illegal monopolization. Thus, although we think that the district court correctly held that the appellants violated Section 2, there is no occasion for this Court to reach that issue. Accordingly, we shall not discuss it.

The restraints involved in the three anticompetitive provisions of the operating agreement—price fixing, profit pooling and market allocation—have long been recognized as *per se* violations of Section 1 of the Sherman Act, and the district court correctly so held. The only remaining issue, therefore, is whether a different rule should be applied here because a complete merger of the papers would not have been *per se* illegal, and could have been justified if one of the companies had been failing and if no alternative purchaser had been available. This "failing-company" defense is the sole basis upon which appellants seek to avoid the application of the *per se* rule. They contend that the Citizen was failing in 1940, that the Star therefore could have acquired it, and that it would be inconsistent to say that the lesser restraints resulting from the 1940 agreement—lesser in the sense that they did no completely eliminate an independent entity from the market, as a merger would have done—are to be tested by the more stringent *per se* standard.

The factual predicate for this argument—that the Citizen was a "failing company" in 1940—was, as we show below, properly rejected by the district court; there is therefore no occasion for this Court to consider the broader legal issue that the appellants raise.

We also contend, however, that, in all events, the district court correctly held that the failing company defense would not justify the *per se* restraints in the operating agreement, and that the district court properly directed their cancellation.

I

THE DISTRICT COURT CORRECTLY HELD THAT THE PRICE-FIXING, PROFIT-POOLING, AND MARKET-ALLOCATION PROVISIONS OF THE OPERATING AGREEMENT WERE ILLEGAL *PER SE*

The principal issues in this case involve the application of the prohibitions of Section 1 of the Sherman Act to an agreement which was intended to and did eliminate all commercial competition between the only two daily newspapers in Tucson, Arizona. Under the 1940 joint operating agreement, the Star (morning, daily and Sunday) and the Citizen (evening daily) each retained its separate corporate identity, news and editorial staffs, and newspaper format, but they delegated to TNI, their jointly owned operating company, all of their business functions. The editions prepared by each company were printed in a single plant and distributed by TNI. TNI was given exclusive power to sell advertising and to fix the circulation and advertising rates for both newspapers. The net revenues of the joint operation, after payment of TNI's expenses, were divided between Star and Citizen according to a fixed ratio which did not reflect variations in their respective circulation and advertising lineage. The parties further agreed not to engage in any other publishing business in the

Tucson area. On the basis of the pleadings and affidavits, the district court found that the price-fixing, profit-pooling, and market-allocation provisions of the operating agreement were *per se* violations of Section 1 and entered summary judgment for the government on this issue.

There can be no real disagreement that these provisions are illegal *per se* under the decisions of this Court. The agreement plainly resulted in price fixing, since there was a complete delegation of power over advertising and circulation rates to the operating company, which was jointly controlled by the two newspapers; and there was no reservation of any right to either party to act independently in this respect. Whether the operating company be regarded as a separate entity or the alter ego of the parties makes no difference. Such price fixing was illegal *per se*.[11] "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action." *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Sealy, Inc.*, 388 U.S. 350, 355.

The agreement further provided an inflexible ratio by which the joint profits would be distributed, thus sharply reducing the economic incentive for competing

[11] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218; *United States* v. *Line Material Co.*, 333 U.S. 287, 307 and n. 21; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5; *United States* v. *General Motors Corp.*, 384 U.S. 127, 147.

for circulation and advertising revenues. This provision was an integral part of the operating agreement: without such an arrangement, as the Star's business manager in 1940 testified, "it would have just been as competitive as it was before and that's exactly what we were trying to avoid" (A. 159). Such profit pooling "destroys every motive for competition" (*Northern Securities Co.* v. *United States,* 193 U.S. 197, 328). This Court has said of similar arrangements: "Clearer restraints of trade are difficult to imagine." *United States* v. *Pictures, Inc.,* 334 U.S. 131, 149.

The agreement not to "engage in any other publishing business in Pima County" (F. 19, A. 73) was in fact a commitment by Star and Citizen to restrict themselves to the publishing of the newspapers they were then producing and to stay out of each other's field. Thus Star could not publish an evening edition and Citizen was barred from publishing a morning or Sunday edition. Such a division of fields, particularly when coupled with a price fixing arrangement, also is illegal *per se. Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593; *United States* v. *Sealy, Inc.,* 388 U.S. 350; *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211.

Since the pleadings and affidavits in this case established that these provisions of the 1940 operating agreement were within the categories which the courts have declared to be *per se* illegal, summary judgment was appropriate because there was no need for further inquiry as to the reasonableness of the restraint on competition. *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5; see *White Motor Co.* v. *United*

States, 372 U.S. 253, 259–260. By granting summary judgment the district court determined that appellant's contention that Citizen was a failing company was legally irrelevant, as an attempt to show the reasonableness of anticompetitive practices which were *per se* illegal. As we argue below (pp. 35–42, *infra*), this determination was correct because even if Citizen was a failing company which lawfully could have merged with Star, that defense should not be extended to agreements whereby two competitors retain their independent identities while eliminating all commercial competition between them, and that issue presented no factual questions requiring a trial. The Court need not reach this legal issue, however, because, as we now show, the district court correctly held that the evidence which appellants adduced at the trial on the other issues does not support their contention that Citizen was or is a failing company.

II

THE FAILING COMPANY DEFENSE DOES NOT JUSTIFY THE PRICE-FIXING, PROFIT-POOLING, AND MARKET-DIVISION RESTRAINTS IN APPELLANTS' JOINT OPERATING AGREEMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT THE EVIDENCE AT TRIAL DID NOT ESTABLISH A FAILING COMPANY DEFENSE

In the circumstances of this case, appellants were not prejudiced in asserting their failing company defense by the entry of summary judgment on the Section 1 violations. Although the district court refused to hear appellants' evidence on that issue in initially determining that price fixing, profit pooling and

division of markets under the operating agreement were *per se* unlawful, appellants introduced that evidence at the trial on the other violations alleged by the government (under Section 2 of the Sherman Act and Section 7 of the Clayton Act). In the light of that evidence the district court was urged, but refused, to set aside its Section 1 determination.

The district court designated as factual issues for trial (1) whether appellants' practices under the operating agreement were intended to and did give them the power to control prices and exclude competitors, and (2) whether they obtained such power "by means of restraints of trade which contravene Section 1 of the Sherman Act" (A. 141–142). Appellants were permitted to adduce at the trial extensive evidence showing the financial condition of the Citizen prior to 1940 and the circumstances leading to the operating agreement, the problems of newspaper publishing operations in Tucson, and other factors bearing on the failing company defense (see, *e.g.*, the sources cited in App. Br. pp. 41–49). At the close of trial, appellants argued, in support of a motion to set aside the summary judgment, that the evidence demonstrated that the operating agreement was reasonable in light of the financial difficulties of the Citizen and the condition of the newspaper market and therefore did not violate Section 1 (A. 17, docket entry 155). After considering that evidence, the court found—correctly, as we show below—that the essential elements of the failing-company defense had not been established, and refused to set aside its

summary judgment (minute order Dec. 28, 1966, A. 18 (docket entry); see App. Br. p. 25).

1. The district court correctly held that appellants had not shown that Citizen was a failing company in 1940

The failing company defense to a charge that a merger of two competitors violated Section 7 of the Clayton Act was recognized in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291. In that case, the evidence showed that the resources of one company were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated * * *" (280 U.S. at 302). The Court held that the acquisition of that company by a competitor "(there being no other prospective purchaser) * * * to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences" of the company's probable liquidation did not "substantially lessen competition" within the contemplation of Section 7 (*id.* at 302–303).

The Court's opinion in *International Shoe* indicates that the failing company defense is available in a merger case only where it is clearly shown that one of the companies would be unable to continue its operations under the same or new ownership, and hence that its elimination through merger merely slightly advances the time when the other company would be able to take over the share of the market that the failing company had prior to its liquidation. See *Erie Sand & Gravel Co.* v. *Federal Trade Commission,*

291 F. 2d 279, 280 (C.A. 3). In the present case, however, the district court found (F. 17, A. 72):

> At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing entered into the operating agreement.

That finding, which is amply supported by the evidence, completely undercuts the factual premise for appellants' contention that the restrictive provisions in the operating agreement can be justified by the failing company defense.

Although the Citizen operated at a deficit in the years 1932–1940, it had a competent staff and a substantial readership, as evidenced by its circulation figures. In 1939, the last full year before the operating agreement, the Citizen's average daily circulation was 10,532, or 45 percent of the daily newspaper market, an increase of 22 percent over its 1938 circulation, while the Star's circulation had increased only about 3 percent over that same period (D.X. 149b, A. 495). The Citizen increased its operating revenues by about 10 percent from 1938 to 1939 and reduced its deficit by about 16 percent to $25,821; the Star in the same period suffered a slight decline in operating revenues and its profits declined by about 40 percent to $20,417 (G.X. 47, A. 435). In the competition for advertising where the Citizen had encoun-

tered the greatest difficulty (due, in part, to the Star's Sunday edition, which had a greater circulation than the daily edition of either paper), the Citizen was able to increase its advertising lineage by about 10 percent from 1938 to 1939, despite higher rates, and to increase its share of the advertising market from 33.2 to 36.1 percent (DX 147(b), 149(b), A. 494–495; D.X. 162, A. 500).

The Citizen's owner, William A. Small, Sr., gave no indication that he contemplated liquidating the newspaper at the time the operating agreement was signed in March 1940. Small, who had considerable experience in the newspaper business, was familiar with the financial condition of the Citizen when he acquired a 25-percent interest in it in 1936 (F. 14, A. 71–72; A. 198). Although the Citizen continued to operate at a deficit, Small remained in Chicago and increased his holdings to 75 percent of the Citizen's stock by 1939 (A. 198–200). He did not move to Tucson until the fall of 1939 and was prepared, as the district court found, "to finance the losses of Citizen Publishing for some little time thereafter" out of his own resources (A. 199, 206; F. 14, A. 71–72).

Although Small had attempted, prior to his moving to Tucson, to interest some of his friends in investing money in the Citizen to support its operations during the time needed to "re-establish ourselves," there is no evidence that he ever retained a broker to sell the company or systematically sought a buyer from among his acquaintances in the newspaper business (A. 205–206). Upon Small's arrival in Tucson, negotiations with the Star concerning an operating agreement, which had been discussed on

his previous visits, "really got down to tacks" and were concluded the following March (A. 201–202; F. 17, A. 72). But there is no evidence that Small, who had delayed three years before assuming management of the Citizen, abandoned his intention to "re-establish" the paper within six months of his moving to Tucson and would have discontinued his efforts to maintain the Citizen as an independent newspaper if the operating agreement had not been consummated.

The actions of the Star lend further support to the court's finding that Small was prepared to continue his efforts to improve the Citizen's financial condition. It was the Star, not the Citizen, which initiated the negotiations culminating in the operating agreement (F. 16, A. 72; A. 147–149, 184–185). Although the Star's owner testified that he anticipated that the Citizen would eventually fail and be offered to him (A. 179, 182, 184, 189), it is apparent that he thought that the Citizen, under either Small or possibly a new owner, might continue to improve its position and pose a significant threat to the Star. Otherwise, it is difficult to explain the Star's willingness to enter into an agreement to share its profits with a losing venture which, under appellants' theory, was about to go out of business and leave the entire market to the Star.

While the Star's owner testified that he preferred the operating agreement because he did not want Tucson to become a one-publisher city (A. 189), the 25-year term of the agreement and the "generous" share of the combined profits allocated to the Citizen (which amounted to $41,870 as early as 1943) go far beyond what would have been necessary to sustain

the Citizen during its attempts at rehabilitation (G.X. 47, A. 437). Through the operating agreement, the Star eliminated, at a substantial cost, all commercial competition between it and the Citizen and raised significant barriers to the entry of a new competitor in the market. The arrangement was financially beneficial to both parties; the combined pre-tax profits have risen from 10.4 percent in the first full year under the operating agreement to 20 percent of revenues, the level at which they have remained for many years (F. 35, 36, A. 76, GX 47, A. 431–437).

Finally, appellants have not shown that before adopting the restrictive provisions of the joint operating plan they tried or considered other possible measures to improve the Citizen's position but found them unavailing. The record contains no indication that Small attempted to improve the Citizen's financial position through measures such as internal cost reduction, promotional efforts, or better personnel or features. His efforts to obtain new capital were limited to soliciting investments from a few of his acquaintances before he moved to Tucson. Unlike *International Shoe,* the record here does not establish that the Citizen could have been sold only to its competitor; Small never attempted to sell the newspaper. Compare *United States* v. *Third National Bank,* 390 U.S. 171, 190–192; *United States* v. *Diebold, Inc.,* 369 U.S. 654.

In addition, the testimony at trial indicates that the Star and the Citizen never considered, much less tried, any joint publishing and distribution arrange-

ment, such as a unified plant and distribution system without price fixing and profit pooling. The primary purpose of the operating agreement was to eliminate competition between the two newspapers; appellants apparently had no interest in trying to solve the Citizen's financial problems through less anticompetitive methods. As the Star's owner testified, any formula for distributing the combined revenues based on the relative performances of the two papers "would have upset the whole affair." (A. 192). The Star's principal negotiator, who later became business manager of TNI, candidly stated (A. 158):

> That was the whole idea, that it would have defeated all the ideas we had for accomplishing this unification. We were trying—I guess that competition is a nasty word in this court—but we were trying to eliminate the competition between the two of us, that's all. There was no use competing in the family.

In these circumstances, appellants cannot now be heard to claim that there was no occasion to explore alternative methods of solving the Citizen's financial problems because such attempts could not have succeeded. Not only is their evidence on this issue highly speculative, but it ignores the critical fact that careful prior consideration of such alternatives by the parties is essential before a merger with anticompetitive effects can be justified under the failing company defense. As the Court explained in an analogous context (*United States* v. *Third National Bank*, 390 U.S. 171, 189–190):

> If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the situation is radically different. * * * * * * [The] test does not demand the impossible or the unreasonable. It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

See, also, *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 301–302; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655.

2. The district court correctly rejected appellants' contention that Citizen would be unable to survive if the illegal aspects of the joint arrangement were eliminated.

The United States attacked, and the court below enjoined, only the *per se* Sherman Act violations embodied in the operating agreement. The court found that "the printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price-fixing, profit-pooling, and market-allocation agreements" (A. 98–99). Thus Star and Citizen remain free to continue their joint use of production and distribution facilities. The record does not support appellant's contention that Citizen would fail under such an arrangement.

The principal evidence on which appellants rely is the testimony of an accountant who prepared a *pro forma* statement, on the basis of consultations

with appellants, which estimated that if Star and Citizen had operated with joint production and distribution facilities but separate advertising, circulation and business departments, Citizen would have had losses of $35,249 in 1962, $120,076 in 1963 and $75,923 in 1964 (D. X. 163, A. 501). However, this testimony rests on the questionable assumption that, despite a projected doubling of advertising promotional expenses and a tenfold increase in circulation promotion (A. 346–347), Citizen's advertising and circulation revenues would have remained the same as they were under the operating agreement (A. 316). On this record, there is, of course, no way of knowing what the revenues would be if the Star and Citizen operated independently, since neither company has undertaken vigorous independent promotion of its own circulation and advertising since the operating agreement was established.

Moreover, the witness admitted on cross-examination that only a 2 percent increase in Citizen's revenues would wipe out the losses estimated in his figures for separate operation in 1964 (A. 348, 352). Indeed, on a cash flow basis (omitting depreciation), the *pro forma* statement would indicate a profit for Citizen of $52,000 in 1964 (A. 340–344, 350). Finally, the witness stated that he was "not testifying that these are precise or exact results of the operation, had these conditions been in effect" (A. 329). On this record, the district court correctly concluded that the results of Citizen's operations in a competitive market could not be accurately predicted (F. 192, A. 99), and properly rejected appellants' claim that without

the price-fixing, profit-pooling and market-allocation provisions of the operating agreement, the Citizen could not survive as an independent entity.

There is now a strong market for an afternoon newspaper in Tucson. In the last quarter of 1965 the Citizen's average daily circulation was 40,978 compared to the morning Star's 40,908 (A. 450). There is thus a substantial market available to advertisers who wish to "buy" access to Citizen's readership, cf. *Times-Picayune* v. *United States*, 345 U.S. 594, and they have used the Citizen to reach it.[12]

Furthermore, nothing in the district court's judgment would prohibit Star and Citizen from adopting other kinds of joint action which would achieve any necessary production economies without eliminating competition. The decree requires only that appellants delete from the operating agreement the provisions related to price fixing, profit pooling and market allocation (A. 103). In short, they are required to resume economic competition but are not barred from joint operation which achieves genuine efficiencies consistent with that end.

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[12] Comparisons of advertising lineage by inches in the two newspapers are somewhat imperfect because the only figures available on lineage for the Star included both its daily and Sunday editions. Nevertheless Citizen compared favorably. In 1964 the figures were (GX 50, A. 451):

Star:		Citizen:	
Local	1,227,472	Local	1,202,775
National	134,408	National	134,643
Classified	432,873	Classified	353,552
Legal	15,969	Legal	9,587

National and classified advertising is presently sold only on a combination rate basis (GX 45).

B. IN ALL EVENTS, THE FAILING COMPANY DEFENSE IS NOT APPLICABLE TO THE RESTRAINTS INVOLVED IN THIS CASE

In an attempt to avoid the application of *per se* rules to their price-fixing, profit-pooling, and market-allocation agreements, appellants argue that the operating agreement, viewed in its totality, effected a "partial merger" of the two companies. Accordingly, they contend, the entire arrangement is lawful under the "reasonableness" test which is applicable to mergers because the Citizen was a failing company and the agreement served the socially desirable objective of maintaining two independent news staffs and editorial policies in the Tucson area. Although we believe that the district court correctly found that Citizen was not a failing company (see pp. 26–32, *supra*), there are sound reasons why the failing-company defense should not be extended to validate the anticompetitive practices in this case.

1. The nature and probable effect of appellants' joint operating agreement differ significantly from a merger. Because of these differences, the failing company defense available in merger cases should not be extended to protect appellants' arrangement

a. Price-fixing agreements between competitors are deemed unlawful *per se* principally because they commonly serve no purpose except the elimination of competition. Mergers between competitors, however, are more complex transactions, and may serve a variety of legitimate purposes, such as a beneficial restructuring of the industry and the stimulation of business initiative and investment, which may outweigh the adverse effects of the elimination of competition between

the merging firms. Moreover, the economic benefits and competitive detriments of a merger are not susceptible of discrete treatment, since each is an aspect of the same unitary transaction. A merger necessarily involves the complete disappearance of one of the merging corporations as an independent economic entity and the acquisition by the surviving firm of its powers, franchises, assets, and liabilities in order "to facilitate the accumulated business of the purchaser." *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302–303.

Accordingly, a *per se* rule is not applied to mergers. Instead, each transaction is examined with a view to determining whether it may tend substantially to lessen competition. The viability of the merging companies bears directly on that inquiry, as the failing company defense appropriately recognizes. See *International Shoe Co.* v. *Federal Trade Commission, supra.*

Unlike an actual merger, a joint operating agreement like the one between the Star and the Citizen allows the realization of the benefits of operating economies without requiring the toleration of all anti-competitive effects, since the arrangement can be limited to the joint use of production and distribution facilities, without any necessity for the inclusion of price-fixing and related provisions. Because such a separation of benefits and detriments is possible, there is no more reason to permit a price-fixing agreement when it is accompanied by an agreement for joint operation of facilities then there is to permit such an agreement standing alone. See *Associated Press* v. *United States,* 326 U.S. 1, where restrictive by-laws of the associa-

tion were invalidated without interfering with its news-gathering and dissemination activities.

The joint operation of facilities is not under attack here, and the district court expressly found that joint production and distribution of the Star and the Citizen "does not depend upon the continuation of the price fixing [and] profit pooling * * * agreements" (F. 190, A. 98–99). Rather, appellants contend that price fixing and profit pooling were required, quite apart from joint production and distribution, because the Star and the Citizen needed the increased profits which the elimination of commercial competition between them would make possible; in fact, this was their purpose in entering into the 1940 agreement (F. 23, 24, A. 74). Nor is it likely that such competition will be resumed in the foreseeable future. Appellants' agreement has been extended to 1990 and is so plainly beneficial to the parties' mutual private economic interests that it will not, in all probability, be voluntarily ended. Hence, in economic effect, appellants' agreement is distinguishable from joint arrangements which inject a new competitive force in a market (see *United States* v. *Penn-Olin Co.*, 378 U.S. 158), or which preserve a substantial arena of commercial competition between the parties (see, *e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231; *Virginia Excelsior Mills, Inc.*, v. *Federal Trade Commission*, 256 F. 2d 538, 541 (C.A. 4)). The arrangement here completely eliminates all price competition in the only two relevant markets—advertising and circulation—and removes the primary economic incentive to compete at the journalistic level. Such an arrangement between

competitors in the same market acting through a common agent is a classic horizontal agreement in restraint of trade, even when viewed as a joint venture. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275.

Appellants' argument thus amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here.

b. Appellants correctly point out that the surviving corporation of a merger has the power to fix its prices, distribute its profits, and select its market area in respect of the combined business—created by the merger (Br. pp. 49–52). But it does not follow that the power which one company might validly obtain through a merger with a failing company may lawfully be exercised by both companies acting jointly to eliminate competition between them.

Had Citizen been a "failing company" in 1940, and had no other purchaser been available, Star could have acquired its business by merger or purchase, and would have enjoyed a newspaper monopoly in Tucson until new entry occurred. However, the joint operating agreement, by which Star and Citizen shared monopoly power, may have had a greater impact on competition than a merger.

The joint operating agreement provided that Star and Citizen, which remained separate corporate entities under separate ownership and management, would, "as far as practicable, * * * maintain the present make-up and format of their respective newspapers in order to preserve their respective identities and characteristics" (A. 43). The district court correctly observed that the maintenance of the apparent independence of both newspapers was more likely to inhibit new entry into the newspaper business in Tucson than if both newspapers had been merged under one owner, as in Phoenix.[13] The actual experience of Phoenix and Tucson with respect to new entry confirms the district court's concern. In Phoenix there have been three recent efforts at entry (App. Br. p. 34 n. 19); in Tucson, prior to the filing of the

[13] The court stated (A. 649–651):

> [M]y principal failure to accept the argument made earlier that this was a merger of Citizen into the Star is that it simply isn't a merger. But I had this thought also from the standpoint of why it is different than where there is a merger. In Phoenix people speak about Pulliam. In other words, people in Phoenix, the people always talk about Pulliam's papers * * *. It is true there is the Republic and the Gazette, but this is Pulliam's voice * * *. And down in Tucson they talk of Bill Mathews and they talk of Small. And the image of the paper here is of two competing papers, that is the public image. My thought was if there be anybody who would like to start a paper; in other words, if there is a feeling in Phoenix you have only one point of view, you only have one man's papers, you feel a little more like you have a better opportunity to start to compete with that paper than you would where the public conception is you already have two different papers * * *. The only thought, and it was strictly a difference that I saw between the effect of merger,

instant case, there were none.[14] Even though the efforts in Phoenix ultimately failed, potential competition is a factor there and new production technology and population growth may yet provide the conditions for a successful new entrant. Had the Citizen and Star merged in 1940, there is no reason to assume that similar efforts would not have been made to enter the growing Tucson market.

Moreover, joint operating agreements like the one involved here plainly hold enormous attractions for both parties, who retain their independence under their existing ownership and management but are insulated from commercial competition from each other. By confining the failing company defense to mergers, the law places the owner of an enterprise on notice

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an absolute actual merger and what happened here by way of an operating agreement, which counsel spoke of as a merger of the commercial properties of the two papers, that is what I was getting at, the difference in image and the possible effect it might have on potential competition * * * there might be this to consider, if they had actually merged, competition, if there were to be any might have been fostered a little better in a place where there was an actual merger rather than a place where there was a joint operating agreement * * *.

[14] After the entry of summary judgment declaring the anti-competitive aspects of the operating agreement illegal, the publisher of a *weekly* newspaper, the Tucson American, expanded his operations to a daily publication. Appellants' counsel asked the district court to take judicial notice "that the Tucson American is now a six-day newspaper rather than a weekly newspaper." The court declined to do so. The Tucson American was delivered on a voluntary-payment basis, and was free on Wednesdays. We are informed that it returned to weekly operation after six months. (Tr. February 14, 1967, pp. 187–188).

that, should his fortunes decline sharply, his only recourse (apart from liquidation of his business for salvage value) would be to surrender his business independence and seek a merger with a competitor, who is likely to be aware of his plight and drive a hard bargin over the terms of the acquisition. The incentive to take all possible steps to reverse a business decline may be less urgent, however, where the businessman has the comfort of knowing that if his decline continues to a certain point, he may be able to fix prices and pool profits with his competitor, thus assuring a continued independent position in the market.

The opportunity to litigate a failing company defense is also likely to encourage the making of joint operating arrangements containing anti-competitive provisions and to compound the burdens on both the courts and enforcement agencies. Such arrangements may take many forms, ranging from naked price fixing to more extensive amalgamations of varying degrees. But each such case, no matter how limited the integration of the firms' operations, would require a judgment as to whether the business distress of one of the parties was sufficient to make the defense applicable.

Finally, the free play of market forces is distorted by the application of the failing-company defense to justify an agreement by existing competitors to divide the market between them by price fixing and profit pooling. An agreement which avoids the elimination from the market through the natural forces of competition of a firm which has proven to be ineffective, inefficient, or economically unnecessary is wholly in-

consistent with the premise of the Sherman Act that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 4. The process whereby market competition ultimately allocates resources to their optimal uses in the economy would be artificially manipulated if a failing company could preserve itself by agreeing to eliminate competition. The function of the market as an impartial economic regulator would be replaced by private agreements implementing their beneficiaries' view that the preservation of firms which are unable to survive in a competitive market is good for the community.

2. The asserted benefits of appellants' restraints of competition in the newspaper industry are speculative and, in all events, do not justify relaxing the prohibitions of the Sherman Act

Appellants and the *amici* argue, in effect, that First Amendment values, expressed as a concern for preserving a "multitude of tongues" to speak on local and national affairs, justify an arrangement which extinguishes all economic competition between newspapers and inhibits entry by any other publisher as the only means, they allege, whereby diversity in news and editorial policy in Tucson can be preserved. Even if that argument could be countenanced as a defense to the purposeful elimination of competition, the operat-

ing agreement here offers a dubious promise of social gain.

The alleged diversity of news and editorial policy in Tucson is maintained at the cost of depriving that community of any voice in determining whether both newspapers shall survive as they are presently operated. Moreover, the operating agreement raises substantial barriers to entry because a new publisher would have to capture the weaker newspaper's circulation and advertising. Since the agreement has been extended until 1990 and can be terminated only by mutual consent, these effects will be perpetuated regardless of the subsequent growth of the market or the development of new cost-reducing technology and other conditions for viable economic competition. In addition, each of the owners, by exercising his power under the stock option agreement to veto the sale of the other newspaper to a third party, may influence the selection of the person who will continue to supply "diverse" views to the community (see pp. 10–11, *supra*). These restraints hardly comport with the underlying purposes of the Sherman Act or the First Amendment. As this Court stated in *Associated Press* v. *United States, supra,* 326 U.S. at 20:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *. Freedom to publish is guaranteed by the Constitution, but freedom to combine

> to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

See *United States* v. *Continental Can Co.*, 378 U.S. 441, 464–465.

Moreover, the extent to which genuine news and editorial competition will exist between newspapers operating under a joint agreement is speculative because the economic return to each newspaper does not depend entirely on its performance. Under the profit-pooling arrangement, each newspaper's income is not directly geared to its individual effort in news gathering or presentation. In the long run, such a community of economic interests, and the inevitable awareness of appellants' management that significant expenditures to improve their newspapers' content are likely to result only in lower profits for both, is not likely to encourage the vigorous competition in news gathering that ordinarily exists between competing independent newspapers.[15]

In view of the duration and pervasiveness of the elimination of competition in this case, appellants seem to be suggesting that a "natural monopoly" market exists in Tucson, *i.e.*, that the community can maintain only a single newspaper enterprise and that the operating agreement merely reflects that fact. But even if this were true, and the present profitability of both Star and Citizen suggest that it is not, there is no reason to assume that the Tucson newspaper market

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[15] Compare Breed, *Social Control in the News Room*, 33 Mass Communications 326–335.

will forever be closed to substantial competition. Newspaper publishing has recently been described by the Department of Commerce as one of the fastest growing industries in the country.[16] In the last ten years newspaper employment increased by 18 percent to more than 350,000; the circulation of daily, Sunday, and weekly newspapers increased by 13 percent; and advertising revenue rose 54 percent. Daily newspaper circulation rose from 57.4 million in 1958 to 61.6 million in 1967. Subscriptions and sales of daily papers increased from $917 million in 1958 to $1.2 billion in 1966, and advertising revenues rose from $2.2 billion in 1958 to $3.4 billion in 1967.[17] Most significantly, the industry is presently in the midst of a technological revolution in the production of newspapers, including the use of computer systems and new printing methods.[18]

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[16] U.S. Department of Commerce, *Growth Pace Setters in American Industry*, 1958–1968, pp. 87–90.

[17] *Ibid.*

[18] "A technological revolution in the production of newspapers has been a major factor in the growth of the industry * * *. Among the most exotic of these are computer systems, now in use in some 300 newspapers, and a new web offset process with almost 450 daily and well over one-third of the weekly newspapers planned to have capability by the end of 1968. The larger daily newspapers have also made huge investents in new letterpress equipment, and all segments of the industry have invested in new plants and facilities." U.S. Department of Commerce, *Growth Pace Setters in American Industry*, 1959–1968, p. 87.

Although amicus Publishers state (Br. 16) that newspapers' share of total advertising expenditures has declined, they continue to attract nearly twice as much advertising revenue as television (see *Growth Pace Setters*, *supra*, at p. 87). Moreover, the relative shares of the advertising dollar produce somewhat mis-

Although some observers support appellants' assertion that there is an irreversible trend toward newspaper monopoly (see App. Br. pp. 5–7, 31–34; Br. for Amicus ANPA p. 16; Br. for Amicus Newspaper Publishers pp. 10–15), others believe that with appropriate utilization of new cost-reducing technology and improved distribution systems the trend can be reversed by opening the way to new entry in the expanding metropolitan area markets.[19] There is no indication that these general considerations are not applicable to the growing Tucson area (D. X. 174, A. 505–506).

We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements. See *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 220–221; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597–598. Congress has de-

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leading comparisons since it does not appear that the increased advertising expenditures in the new media have been entirely at the expense of newspapers, but rather have resulted in part from creation of those new media. The district court found that the existence of other advertising media in Tucson does not constitute an obstacle to ~~the defendant's~~ appellants' ability to increase the prices of advertising space in their newspapers. (F. 180, A. 97).

[19] See generally Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, *The Failing Newspaper Act*, Parts I–V, 90th Cong., 1st Sess.

termined that the free play of economic forces is the best assurance of the allocation of resources to social advantage. *Northern Pacific R. Co.* v. *United States, supra,* 356 U.S. at 4; see *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457, 468. We refer to those conflicting views only to emphasize that any relaxation of the Sherman Act's prohibitions for the newspaper industry presents problems which should be resolved by Congress.[20]

III

THE DISTRICT COURT'S ORDER REQUIRING DIVESTITURE OF THE STAR, THE ACQUIRED NEWSPAPER, WAS PROPER

The district court found that the Citizen's acquisition of the Star in 1965 violated Section 7 of the Clayton Act and ordered divestiture of the Star.[21] The decree directed appellants to submit a plan of divestiture which will provide "for the continuation of the Arizona Daily Star under ownership wholly free from any interests of or control by" appellants

[20] Legislation designed to relax antitrust standards with respect to various newspaper arrangements was introduced in the 90th Congress. The first of the bills, S. 1312 (90th Cong., 1st Sess.), was the subject of Senate committee hearings (Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. (5 Vols. currently in print)). Bills were also introduced in the House. See, *e.g.*, H.R. 19123, 90th Cong., 2d Sess.; hearings were held on this bill by the Antitrust Subcommittee of the House Judiciary Committee but these hearings have not yet been printed. When the 90th Congress ended, no bill had been reported out of the Judiciary Committee in either chamber.

[21] Since Arden now owns the assets of Star Publishing, the court authorized divestiture either by a sale of Star's assets or by a sale of all of Arden's stock (A. 102–103).

(A. 103). Coupled with the elimination of the unlawful provisions of the joint operating agreement, the decree is designed to restore newspaper competition in Tucson.

Appellants have not appealed from the court's determination that the acquisition of the Star violated Section 7. Nor do they deny that divestiture constitutes appropriate relief. Indeed, they state that they have no quarrel with the divestiture order "as long as the operating agreement remains substantially intact," since in that event divestiture of the Star "does not pose * * * any significant problem" (App. Br. 61). They contend, however, that if the operating agreement is to be modified to eliminate its price fixing, profit pooling and market allocation provisions, then the decree should be modified to permit divestiture of either the Star or the Citizen rather than to require them to divest the Star and retain the Citizen which, they assert, is "headed for failure."

The framing of decrees in antitrust cases is the proper task of the district courts. *International Salt Co.* v. *United States,* 332 U.S. 392, 400. In performing this task, they are endowed with "a wide range of discretion * * * to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained * * * [this Court] will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 185. No such showing has been made here.

Divestiture of the acquired enterprise is the customary relief in Section 7 cases, for less stringent

measures ordinarily will not effectively redress the violation. *United States* v. *duPont & Co.*, 366 U.S. 316, 328. Appellants offer no compelling reason for departing from this settled course. Although they assert that Citizen is bound to fail, the district court properly found that "it is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation" (F. 192; see *supra*, pp. 32–33). Moreover, the precise terms of the divestiture have not been formulated or approved by the district court; there will, therefore, be a further opportunity to consider what conditions are most likely to further the primary objective of restoring two newspaper competitors to Tucson.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

RAMSEY CLARK,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

JOSEPH J. CONNOLLY,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
CHARLES D. MAHAFFIE, JR.,
GERALD A. CONNELL,
ARTHUR I. CANTOR,
Attorneys.

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